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No. 99-312

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF TEXAS, ALABAMA, OKLAHOMA, PENNSYLVANIA, AND SOUTH CAROLINA

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Atty General

LINDA S. EADS
Deputy Attorney General

GREGORY S. COLEMAN
Solicitor General
Counsel of Record

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR TEXAS

Additional Counsel Listed Inside

BILL PRYOR
Attorney General for the
State of Alabama

NORMAN N. HILL
General Counsel
State of Oklahoma ex rel.
Oklahoma Department of
Transportation

D. MICHAEL FISHER
Attorney General for the
State of Pennsylvania

CHARLIE CONDON
Attorney General for the
State of Carolina

QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), when it held that claims of negligence based on inadequate warning devices at a railway grade crossing are not preempted even though the warning devices at the crossing were installed with federal funds under a project approved by the federal government.

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This case involves whether the approval of federal funding by the Federal Highway Administration (FHWA) for a project for the installation of passive warning devices at a railroad grade crossing pursuant to 23 C.F.R. §646.200, *et seq.*, preempts a state-law negligence claim regarding the adequacy of the devices. For the reasons that follow, amici believe that adequacy-based claims are preempted in those circumstances and urge the Court to reverse the Sixth Circuit's judgment to the contrary.

INTEREST OF AMICI

Amici Curiae Texas, Alabama, Oklahoma, Pennsylvania, and South Carolina have participated in the Federal Grade Crossing Program since its inception in 1973 and have many thousands of railroad grade crossings at which both active and passive warning devices have been installed with federal funding.[1] The program is a cooperative venture in which the states are primarily responsible for the evaluation of grade crossings and the determination of the protective warning devices to be installed in federally funded grade-crossing projects.

Amici do not argue that preemption of state law is necessarily desirable as a general matter; rather, presupposing the Court's *Easterwood* decision and the preemptive nature of §§646.214(b)(3) and (4), the states have a strong interest in protecting their traditional role in evaluating and regulating traffic safety needs at railroad grade crossings and in maintaining a clear and concise rule to determine when state-law tort claims are preempted by federal law.

When the program was initiated, the federal government preserved the states' traditional role in determining the safety needs at grade crossings. The Sixth Circuit's decision in this case potentially puts the states in an untenable position by pitting their judicial branches—through enforcement of state tort law—against their executive branches' determination that

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1. Texas alone has more than 18,000 grade crossings, of which more than 12,000 are public crossings. FEDERAL RAILROAD ADMINISTRATION, U.S. DEP'T OF TRANSP., RAILROAD SAFETY STATISTICS—ANNUAL REPORT 1998 (July 1999), at Table 9-2.

the safety devices installed as part of a federally funded project are adequate. Worse, the court of appeals's holding requiring independent federal determinations of the adequacy of warning devices (apart from funding approval) will upset the federal-state balance and diminish the states' traditional role in regulating and policing rail-crossing safety.

Congress's desire for national uniformity led it to make federal preemption part of the federal-state bargain. Although most discussions of the preemptive nature of §§646.214(b)(3) and (4) have focused on the preemption of claims against railroads, the states have also relied on the fact that the preemptive shield also extends to claims against the states, which are not uncommon.[2] When a state participates in the program and seeks federal funding to install proposed warning devices it has determined are adequate, it expects that tort claims covered by (b)(3) or (b)(4) will be preempted. The federal government used the carrot of federal funding to encourage the states to participate in a nationally uniform program of planning and implementing grade-crossing safety. Without preemption, there is a danger that the states' increased involvement in that process would subject them to an increased risk of liability.

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2. Some states, like Texas, have relatively few safety device adequacy claims because they have retained much of their sovereign immunity from suit. Other states, however, face the same kinds of claims asserted against the railroads. *See, e.g., Southern Pac. Transp. Co. v. Yarnell*, 890 P.2d 611 (Ariz. 1995); *Rick v. Louisiana Dep't of Transp. & Dev.*, 630 So.2d 1231 (La. 1994); *Farris v. Union Pac. R.R.*, 866 P.2d 189 (Idaho Ct. App. 1993).

Amici have an interest in retaining *Easterwood*'s clearly delineated test for determining whether device adequacy-based tort claims are preempted and in maintaining the integrity of the program to prevent second-guessing of the states' decisions (approved and funded by the federal government) regarding the devices to be installed at railroad grade crossings.

SUMMARY OF ARGUMENT

Under *Easterwood*, state-law tort claims alleging negligence based on the adequacy of warning devices at a railroad grade crossing when federal funds have participated in the installation of the devices pursuant to 23 C.F.R. §646.214 are preempted by 49 U.S.C. §20106. The Sixth Circuit misinterpreted the statutory and regulatory framework when it held that preemption will exist at a grade crossing with passive devices only if FHWA made an actual determination that the devices were needed and adequate. The only approval necessary to invoke preemption is the approval of federal funding for state projects for the installation of warning devices at railroad grade crossings that promote and facilitate safety pursuant to federal guidelines. The requirement imposed by the Sixth Circuit is unnecessary, unworkable, and unsupportable.

ARGUMENT

I. THE FHWA'S APPROVAL OF FEDERAL FUNDING FOR A PROJECT PREEMPTS ADEQUACY-BASED TORT CLAIMS.

A. Section 646.214(b) Preempts Tort Claims Whenever Federal Funds Participate in a Project.

The preemption analysis in this case begins, and ought to end, with *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), in which the Court addressed the scope of the express preemption provision contained in the Federal Rail Safety Act (FRSA), 49 U.S.C. §20101 *et seq.*:

> "The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 49 U.S.C. §20106.[3]

State-law standards or rules, including common-law tort standards, are preempted if a federal regulation covers the subject matter of the state-law duty. Although the Court in *Easterwood* determined that the general regulations describing the highway safety improvement program, *see* 23 C.F.R. pt.

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3. Section 20106 is the recodification of the original FRSA preemption provision, which was found at 45 U.S.C. §434. The repeal and recodification of §434 by the Act of July 5, 1994, Pub. L. No. 103-272, §I(e), 108 Stat. 887, was not meant to make any substantive changes to the law. Pub. L. 103-272 §6, 108 Stat. 1378.

924, and the Manual on Uniform Traffic Control Devices for Streets and Highways, *see* 23 C.F.R. §§655.601-.603, do not preempt state tort law,[4] the Court held that 23 C.F.R. §§646.214(b)(3) and (4) have preemptive effect because they "establish requirements as to the installation of particular warning devices." *Easterwood*, 507 U.S., at 670.

Those regulatory provisions specifically prescribe the safety devices required at certain crossings improved using federal funds and delegate to the states the authority to determine the appropriate safety devices at other crossings, subject to FHWA approval. Section 646.214(b)(3), for instance, requires automatic gates with flashing lights when certain conditions exist, including multiple tracks, high-speed train operation with limited visibility, heavy vehicle traffic, or when a diagnostic team recommends them. When the conditions defined in (b)(3) do not exist, (b)(4) declares that the state's determination of the appropriate type of warning device to be installed is subject to FHWA's approval. These requirements apply to every project in which federal funds "participate in the installation of the devices," 23 C.F.R. §646.214(b)(3)(i), and, when they apply, they cover the

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4. The Court initially noted that the term "covering" is relatively more restrictive than the admittedly expansive term "relate to," making FRSA preemption narrower than ERISA or Airline Deregulation Act preemption. *Easterwood*, 507 U.S., at 664 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992)). Notwithstanding, amici believe that the Court did not intend the extremely restrictive interpretation adopted by the court of appeals.

adequacy of the warning devices to be installed and, therefore, preempt state tort duties:

> "[F]or projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Easterwood*, 507 U.S., at 671.

Under *Easterwood*, Shanklin's tort claims asserting negligence in the use of inadequate warning devices are preempted because §§646.214(b)(3) and (4) control the selection of grade-crossing warnings, and the adequacy of those warning devices is governed by the federal standard. That is all §20106 requires. It is the existence of federal regulations that cover the subject matter of a state-law tort duty to use an adequate warning that creates preemption, not that the regulations were applied in a particular way in a particular instance.

B. The Sixth Circuit's Approach Is Inconsistent with the Regulatory Scheme and Upsets the Federal-State Balance.

The Sixth Circuit refused in this case to follow *Easterwood*'s clear directives. Although *Easterwood* focused on the fact that §§646.214(b)(3) and (4) assumed preemptive power when a proposed project was approved by FHWA and federal funds financed the grade-crossing improvements, *Shanklin* followed the Seventh Circuit's decision in *Shots v.*

CSX Transportation, Inc., 38 F.3d 304 (CA7 1994), to create an additional requirement—specific approval by the Secretary of the safety devices at the crossing at issue—that has no basis in the text, structure, or history of the FRSA. *Shanklin v. Norfolk S. R.R.*, 173 F.3d 386, 394 (CA6), *cert. granted*, 120 S.Ct. 370 (Oct. 18, 1999); *see id.*, at 397 ("Norfolk Southern needed to show that the FHWA approved passive warnings at the Oakwood Church Road Crossing. Norfolk Southern failed to do so, because, as we have held, federal funding alone is insufficient to make such a showing.").

Section 646.214(b)(4), which governed the crossings at issue in both *Shanklin* and *Shots*, states that "the type of warning device to be installed . . . is subject to the approval of FHWA," but that language does not require a separate approval on a crossing-by-crossing basis. *Shots* recognized, contrary to the Sixth Circuit's suggestion, that the FHWA's initial approval of a project for federal funds eligibility could satisfy the (b)(4) approval requirement. 38 F.3d, at 308 ("We do not doubt that the Secretary can approve a warning device before or after its installation or that he can make wholesale as well as retail approvals. We may assume as well that he can act through state safety officials as his delegates."). The Seventh Circuit merely held, albeit wrongly, that the specific agreement at issue did not contain an adequate approval because the agreement addressed only reflectorized cross-bucks at numerous crossings and did not specifically state that the affected crossings would be adequately safe if equipped with reflectorized cross-bucks. *Id.*[5]

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5. Although *Shots* stated that it would have been irresponsible for the Secretary to approve (for preemption purposes) the project at issue in that case, 38 F.3d, at 309, the converse is actually true. There was no evidence before the Seventh Circuit that the crossings affected by the project would not have been adequately protected by reflectorized cross-bucks. That the agreement did not also address other crossings was irrelevant. Moreover, the statutory and regulatory scheme presupposes a reiterative system in which state diagnostic teams prioritize future needs.

There is no reason why the federal government's approval of federal funding—either directly or by delegation—for a state grade-crossing improvement project should not be considered approval of the warning devices the state intends to install as part of the proposed project. The statutory and regulatory framework for submission and approval of projects for which the states request federal funding requires the FHWA to evaluate proposed projects for compliance with the federal standards, including the standards of §646.214(b). Consequently, FHWA approval of a proposed project is, in fact, approval of the devices that the state intends to install at the grade crossings included in the project and, therefore, constitutes approval of non-gate, passive devices to be installed pursuant to §646.214(b)(4).

Since the creation of the Federal Grade Crossing Program in 1973, amici have been active participants in the program. Congress requires the states to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §130(d). Those surveys exist as the DOT/AAR National Rail-Highway Crossing

Inventory, which the states continuously update as part of their §130 obligations. As part of the surveys, the Department of Transportation required the states to develop a methodology for identifying and ranking crossings based on their relative hazard. *See, e.g.*, 23 C.F.R. §924.9(a)(3)-(4) ("The planning component of the highway safety improvement program shall incorporate . . . (3) [a] process for conducting engineering studies of hazardous locations . . . and (4) [a] process for establishing priorities for implementing highway safety improvement[] projects, considering . . . (iii) [t]he relative hazard of public railroad-highway grade crossings based on a hazard index formula."). Within that framework, Texas, for example, prioritizes improvement projects at railroad grade crossings under §130(d) on the basis of a relative priority ranking, taking into consideration several factors such as average daily traffic count, train traffic, train speeds, number of prior crashes, existing types of warning devices, and other relevant factors. Every public crossing in Texas has been surveyed and evaluated for priority index purposes.

In accordance with its priorities,[6] a state may each year develop and submit to FHWA projects for which federal aid is requested. *See* §630.106(a); §924.11(a), (c). All federally funded projects for grade-crossing improvements are subject

6. A particular crossing's position on the priority index is not static but may fluctuate over time. In any given year, a significant number of railroad crossings are not selected and continue to be maintained by the railroads. If the state decides to seek federal funding for the project, it is then placed in line for approval by FHWA.

to the standards of §646.214(b) and, therefore, must comply with the Manual on Uniform Traffic Control Devices for Streets and Highways. §646.214(b)(1). In addition, all grade crossings to be included in a project must be evaluated to determine what warning devices are appropriate. Those determinations are made by extensive computer analysis of data at every grade crossing according to its relative priority ranking. For crossings that are candidates for safety enhancements, Texas, for example, forms a diagnostic team of experts typically made up of local and statewide representatives of the Texas Department of Transportation, representatives of the city and county (as appropriate), a representative of the railroad company,[7] and, if applicable, representatives of FHWA or the Federal Railroad Administration. TEXAS DEP'T OF TRANSP., TRAFFIC OPERATIONS MANUAL: RAILROAD OPERATIONS VOLUME 6-23 (1998). When a diagnostic team inspects a grade crossing, it considers the possible elimination of the crossing, decides on appropriate safety enhancements, prepares initial project layouts, and determines which aspects of the project may be eligible for federal and state cost participation. *Id.*, at 6-24.

7. Unlike Tennessee, diagnostic teams in Texas do include a representative of the railroad. While plaintiffs have sometimes attempted to imply that there is something wrong with railroad representation on diagnostic teams, their presence and expertise is valuable and beneficial. The railroads have no financial obligation to pay for the proposed improvements, so the railroad representative has no incentive to propose a low-cost alternative. To the contrary, the fact that the railroads do not have to pay for the improvements actually suggests that they will recommend more protective alternatives to lower their future risk of liability.

When closing the crossing is not appropriate, the diagnostic team considers appropriate safety enhancements, including:

- active warning devices;
- advance warning signs and pavement markings;
- active advance warning flashers and signs (if sight distance is a factor on the crossing approach);
- preemption of nearby traffic signals (required if intersection is within 200 feet of crossing);
- improvements to roadway approaches and crossing approaches;
- installing or modifying curb and gutter sections, drainage structures, utility adjustments; and
- trimming or removing trees and vegetation.

Id., at 6-24 to 6-25. The diagnostic team will, subject to §646.214(b)(3)(ii), recommend automatic gates with flashing lights at grade crossings at which the conditions listed in §646.214(b)(3)(i) exist. For grade crossings subject to §646.214(b)(4), the diagnostic team will recommend warning devices conforming to the "specifications and design standards and guides" used by the state highway agency in its normal practice. §646.214(a)(2). In every instance, the diagnostic team's recommendations are determined by "which enhancements or combination of enhancements comprise the best solution for the safety to the traveling public at that crossing location." TRAFFIC OPERATIONS MANUAL at 6-25.

The diagnostic team prepares the initial project layouts, and the team decides the placement locations and distances of

signals, signal cabinets, signs, and other enhancements. *Id.* The diagnostic team member from the district office of the Texas Department of Transportation is responsible for converting the initial project layouts, notes, and team decisions into a final set of construction project layouts, and the title sheet is signed by the appropriate district officials, as well as appropriate city or county officials. *Id.*, at 6-26.

Generally, once the evaluative work has been completed, a state may prepare for submission and approval, pursuant to §630.201, a package of plans, specifications, and estimates, with supporting documentation.[8] The plans and specifications must "describe the location and design features" in detail.

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8. The approval process has been modified in some states, including Texas, by oversight agreements between the state highway agency and the FHWA, pursuant to the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998). *See* 23 U.S.C. §106(c). Under those agreements, the state highway agency assumes FHWA's responsibilities for project approval and oversight for certain federal-aid projects as defined in the agreement. Importantly, the oversight agreements do not abrogate the applicable safety requirements. Rather, Congress has merely delegated FHWA's approval to the responsible state highway agency, *id.* ("[T]he State shall assume the responsibilities of the Secretary . . . ."), and both the state highway agency and FHWA are responsible for ensuring that all projects comply with applicable laws, regulations, and standards. The fact that a particular project is undertaken pursuant to an oversight agreement should have no effect on the Court's preemption analysis. In any event, like tens of thousands of grade-crossing projects dating back to the initiation of the program, the enhancements at issue in this case were not made under an oversight agreement.

§630.205(b). Thus, when a state submits a proposed project to FHWA for federal funding, the agency has before it all the information it needs to determine the adequacy of the warning devices that the state proposes to have installed at each grade crossing.

The statutory and regulatory scheme does much more, however, than provide an opportunity for FHWA to approve the adequacy of the proposed warning devices. It affirmatively requires that approval. The proposed project may not proceed until FHWA has approved the plans, specifications, and estimates. §646.216(e)(2)(i). And it is clear from the relevant statutes and regulations that FHWA may not approve the expenditure of federal funds or authorize a project to proceed unless the project will satisfy the appropriate safety requirements.

> "No funds shall be approved for expenditure . . . unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing . . . ." 23 U.S.C. §109(e).

Similarly, the regulations allow FHWA to authorize a project to proceed "only after applicable prerequisite requirements of Federal laws, and implementing regulations and directives have been satisfied." §630.114(b) (1988) (moved to §630.106(a)). The Administrator's approval is in writing and will indicate whether the project is approved "in whole or in part and any qualifications or conditions determined

necessary." §630.112(b).[9] Thus, if FHWA is concerned that a state's proposed project may not contain appropriate safety measures, it may partially approve the project or may qualify or condition its approval to require additional safety measures.

The cooperative system between the state and federal governments works well to promote safety at railroad grade crossings. The system places the responsibility for performing the technical analysis and making crossing-specific recommendations in the hands of technical experts at the state level, and, in return, the federal government alleviates much of the financial pressure by substantially funding the projects it approves. Given that it is the states' responsibility to evaluate and determine the appropriate warning devices at grade crossings enhanced with federal funding, federal preemption of device adequacy-based claims is both equitable and justifiable. While every injury or fatality at a grade crossing is tragic, it is unfair to hold railroads liable for warning-device selection because it is the state (and ultimately FHWA)—not the railroad—that decides what warning devices are appropriate.[10] *See Bryan v. Norfolk & W.*

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9. Even a piecemeal approval of preliminary engineering work that demonstrates a federal commitment to fund safety enhancements at a grade crossing will preempt state-law tort liability for the adequacy of the warning devices at a grade crossing. *See Hatfield v. Burlington N. R.R.*, 64 F.3d 559, 562 (CA10 1995).

10. The court of appeals's suggestion that a finding of preemption would mean that "no one is responsible for the safety of the motorists who use the crossing," 173 F.3d, at 394, is pure hyperbole. At a crossing to which preemption applies, the state itself has taken that responsibility and has determined that the

R.R., 21 F.Supp.2d 1030, 1038 (E.D. Mo. 1997) ("It would be ludicrous to hold a railroad liable based on the government's decision as to what safety device was needed at a given crossing."), *aff'd*, 154 F.3d 899 (CA8 1998). Indeed, it is unclear whether the railroads would even have the authority to install more protective devices when a state has determined that a less protective device is appropriate.

The court of appeals's protest that railroads should enjoy preemption only if "they have taken the desired action," 173 F.3d, at 395, misunderstands the purpose of preemption in this context. Congress did not enact §20106 to reward railroads for their good deeds, and the Sixth Circuit's "understanding of economics" was misdirected in suggesting that §20106 preemption was part of an "incentive-based system" for encouraging the railroads to take a more active role in grade-crossing safety. *See id.* There is no indication in the applicable statutes or regulations that Congress offered preemption as a "prize" for the railroads' increased involvement in grade-crossing safety enhancements. Instead, Congress preempted state law to achieve national uniformity, and it sought to attain that goal by creating uniform federal standards and using federal funding to entice the states to

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warning devices are adequate. Moreover, depending on the circumstances, the railroad may be liable for other kinds of claims. "For example, plaintiffs in state tort actions might allege failure to sound the train's whistle, train speed faster than federal limits, failure to use the train's headlights, inadequate maintenance of the warning device, and inadequate maintenance of the crossing surface." *Lubben v. Chicago Cent. & Pac. R.R.*, 563 N.W.2d 596, 600 (Iowa 1997).

adopt and enforce those standards. Preemption of tort claims against railroads is justified not as a prize for the railroads' increased involvement in the process, but as a result of their decreased involvement and greatly diminished responsibility for the selection of adequate grade-crossing warning devices.

The Sixth Circuit's imposition of an additional condition precedent to preemption of state-law tort claims seriously misconceives the statutory and regulatory framework that governs the development and approval of grade-crossing enhancement projects. By holding that preemption would attach only if the railroad could demonstrate that FHWA had specifically approved the devices installed at a particular grade crossing, the court of appeals required proof of a process that does not exist within the statutory and regulatory scheme separate and apart from the existing project-approval process. There certainly is no provision for any separate documentation to be submitted to or issued by FHWA relating to the determination contemplated by the Sixth Circuit.[11] Nor is there any indication anywhere in the relevant statutes or regulations that Congress or the Secretary intended to create a separate approval process for safety and warning devices installed pursuant to §646.214(b)(4).

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11. Because the specific (b)(4) approval for preemption purposes required by the Sixth Circuit would be separate from the FHWA's project approval, it is unclear what the process or format for that approval would be. In practice, it could mean a flood of duplicative paperwork, because the information relevant to the (b)(4) preemption determination would be the same information submitted for funding approval.

To the contrary, the entire statutory and regulatory framework contemplates and presupposes that agency approvals will be made only in the context of approving a project for federal funding. Although the federal government has decided that national uniformity is exceptionally important in this area, the government has not directly required the states to install specific warning devices at particular grade crossings, nor does it affirmatively regulate the states' decisions regarding the warning devices installed at the thousands of grade crossings nationwide. Instead, as is so frequently the case, the federal government has sought to accomplish its policy goals using the carrot of federal funding. The statutory scheme of Title 23 and the applicable regulations do not force the states to install specific warning devices; they merely indicate that federal funding will not be approved if a state declines to pursue the federal government's policy goals.

It is precisely that aspect of the federal-aid scheme that makes the Sixth Circuit's reading of §646.214(b)(4) so unreasonable. When FHWA approves federal funding for a project submitted by a state, it is making the only approval contemplated by the applicable laws. The statutory and regulatory scheme is laced throughout with requirements related to FHWA's approval of a particular project. There are numerous conditions and qualifications on FHWA's authority to approve a proposed project, only some of which pertain to the adequacy of the proposed warning devices, but, in every case, the approval contemplated by the statutory and regulatory language is approval of federal funding for a state-proposed project, and that approval was given in this case. Despite the consistent regulatory framework, however, the

Sixth Circuit sought to engraft onto the system a separate preemption "approval" that has no support in any of the statutory or regulatory language and is entirely inconsistent with the intent of the program.

Only by fundamentally misconstruing the regulatory framework was the Sixth Circuit able to invent what it pejoratively called the "fiction of constructive approval." *Shanklin*, 173 F.3d, at 393. In truth, FHWA gave the only approval permitted by the applicable statutes and regulations, and the only creation of fiction in this case is the phantom "preemption approval" that the Sixth Circuit found to be missing, but for which there is no statutory or regulatory justification or allowance. In the face of specific requirements that the applicable safety prerequisites be satisfied before federal funding of a proposed project can be approved, the Sixth Circuit simply relegated consideration of those laws to afterthought status. *See id.*, at 395. Contrary to the Sixth Circuit's misconception, the argument is not that "the fiction of constructive approval is statutorily mandated," *id.*, but that actual approval was both statutorily mandated and given in this case. The court of appeals could not permissibly reject that approval by requiring that it appear in a form not envisioned or authorized by the applicable statutes and regulations. FHWA has never been in the business of issuing independent (b)(4) preemption approvals and, consequently, the effect of the court of appeals's decision, if upheld, will be to reject preemption for all (b)(4) grade crossings.

Easterwood's focus on the participation of federal funds, 507 U.S., at 670-71, should not, as the Sixth Circuit suggested, be read as something different from the FHWA approval required by §646.214(b)(4). They are, as

Easterwood contemplated, *id.*, at 671, simply two sides of the same coin. Participation of federal funds in a project means that the project was formally approved, and that in effect means that "the Secretary has determined the devices to be installed," *id.*, thus invoking the preemptive power of §646.214(b). *See Armijo v. Atchison, Topeka & Santa Fe R.R.*, 87 F.3d 1188, 1190 (CA10 1996) ("The Secretary of Transportation's authorization of passive warning devices was tantamount to a determination, pursuant to 23 C.F.R. §646.214(b)(4), that only passive, rather than active warning devices were sufficient, and that determination took the matter out of New Mexico's and Santa Fe's hands."); *Elrod v. Burlington N. R.R.*, 68 F.3d 241, 244 (CA8 1995) ("Federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators."); *Hester v. CSX Transp., Inc.*, 61 F.3d 382, 387 (CA5 1995) ("The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized that expenditure, which in turn legally presupposes that the Secretary determined that the safety devices being installed were adequate to their task.").

Ultimately, the court of appeals fundamentally misconceived the respective roles of the federal and state governments in the process of evaluating and improving grade-crossing safety. While the court of appeals looked for evidence that "the federal government has assumed liability by stepping in and making its own determination," 173 F.3d, at 394, or that "federal regulatory authority has been exercised," *id.*, the regulatory scheme clearly contemplates that the states, not the federal government, are responsible for

making grade-crossing safety determinations. The federal government's role, through FHWA, is only to endorse or reject the states' determinations by approving or disapproving federal funding for proposed projects. The independent federal determination of the adequacy of particular warning devices for which the Sixth Circuit searched would be both inconsistent with and duplicative of the states' traditional role of making those determinations. If the federal government is going to have to make an independent evaluation of the adequacy of the warning devices—separate and apart from its evaluation as part of the funding approval process—why force the states to go through the process in the first place?

Amici vigorously disagree with the Sixth Circuit's suggestion that the other circuits' approach works "an eradication of state sovereignty." *Id.*, at 395-96. To the contrary, it is the Sixth Circuit's approach that would seriously upset the federal-state balance that exists for §130 programs. Preemption of state-law tort claims is part of the bargain for state participation in these programs and, while it does affect the rights of a state's residents, the state's own determination of the adequacy of the grade-crossing warning devices alleviates all or most of any perceived unfairness in preemption. Preempting certain state-law tort claims permits the federal government to accomplish two seemingly inconsistent goals: (1) preserving the states' traditional role in policing and regulating traffic safety at railroad grade crossings; and (2) establishing a nationally uniform, credible, and effective system for evaluating the need for warning devices at railroad grade crossings. Through their cooperative effort, the states and the federal government have successfully reduced grade crossing accidents, injuries, and fatalities since

1973 despite tremendous increases in both vehicular and train traffic.

The court of appeals's concern for state sovereignty rings hollow given that its call for an independent federal determination of the adequacy of the warning devices chosen by the state suggests an unwarranted distrust of the state evaluation process. The Sixth Circuit's approach would work a serious infringement on the states' sovereignty by diminishing the states' role in evaluating the safety needs at grade crossings and determining the appropriate warning devices. It is one thing for FHWA to approve or disapprove the states' own safety determinations; it is another thing altogether for the federal government to oust the states from their traditional role in regulating traffic safety at grade crossings "by stepping in and making its own determination." *See Shanklin*, 173 F.3d, at 394.

The Sixth Circuit's decision in this case jeopardizes the federal-state balance that Congress and the Department of Transportation sought to achieve in §130 programs. It is inconsistent with the text and structure of the express preemption provision, and it has no justification or support in the statutory or regulatory scheme. The Court should reverse the judgment below and reinforce the clear interpretation articulated in *Easterwood*.

II. THE SHOWING REQUIRED BY THE COURT OF APPEALS IS INCONSISTENT WITH 23 U.S.C. §409.

Amici also disagree with the court of appeals's interpretation of 23 U.S.C. §409. Although the court of appeals seemingly did little more than create a narrow exception that would permit the discovery and admission of "the approval of the Secretary or his agent[] of the use of passive warning devices at a particular crossing," 173 F.3d, at 397, the result of its exception is a strange paradox. The one item the court said would be discoverable and admissible under §409 does not exist because FHWA has never been in the business of issuing independent (b)(4) preemption approvals. The court of appeals improperly relied on the unsupported assumption that a defendant could obtain and introduce a separate (b)(4) adequacy approval.

Moreover, it is clear that in the absence of a separate approval document, §409 would preclude the discovery or admission of any backup documentation supporting a claim of approval because it would necessarily constitute a record generated and compiled "for the purpose of developing any highway safety construction improvement project which may be implemented using Federal-aid highway funds." Nor would a defendant be able to introduce independent evidence relating to the adequacy and need for the installation of the warning devices at issue because that would require delving into the factual basis for the necessity of the devices, the very thing prohibited by §409. *See Harrison v. Burlington N. R.R.*, 965 F.2d 155, 159-60 (CA7 1992).

Because the one document the Sixth Circuit suggested might be admissible does not exist, §409 would preclude a

defendant, whether a railroad or a state, from proving that FHWA actually determined that the devices were adequate and needed.

CONCLUSION

Amici urge the Court to reverse the judgment of the Sixth Circuit.

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Respectfully submitted,

JOHN CORNYN
Attorney General of Texas

ANDY TAYLOR
First Assistant Attorney General

LINDA EADS
Deputy Atty General, Litigation

GREGORY S. COLEMAN
Solicitor General
Counsel of Record

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700